Editor's note: Appealed – aff'd, Civ. No. R-2827 (D. Nev.), aff'd, No. 74-2048 (9th Cir. March 2, 1976) 538 F.2d 336, cert. denied, S.Ct. No. 76-53 (Nov. 1, 1976) 429 U.S. 920

W. DALTON LA RUE, SR.
and
JUANITA S. LA RUE,
d/b/a/ WINNEMUCCA RANCH, APPELLANTS;
M. S. LAND and LIVESTOCK COMPANY, INTERVENOR

IBLA 72-179 Decided January 30, 1973

Appeal from a decision (Nevada 3-70-1) by L. K. Luoma, Administrative Law Judge, 1/ affirming a denial of a request to relocate a fence which runs between the Winnemucca Ranch and Paiute Canyon Grazing Allotments.

Affirmed.

Grazing Permits and Licenses: Adjudication

Range agreements are, to all intent and purposes, contracts, and thus must comply with general legal principles applicable to contracts.

Grazing Permits and Licenses: Apportionment of Federal Range

A Federal range licensee has no right to any particular area of the Federal range.

Grazing Permits and Licenses: Adjudication

A licensee's only reasonable basis for challenging the area of his grazing allotment is to show the allotment to be incapable of satisfying the allottee's authorized grazing demand.

Grazing Permits and Licenses: Apportionment of Federal Range

The Bureau of Land Management has the right to exercise its discretionary power to modify existing allotments even after a licensee has lost his right to do so under 43 CFR 4115.2-1(e)(13)(i).

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

APPEARANCES: Peter I. Breen, Esq., Emerson J. Wilson, Ltd., Reno, Nevada, for appellants; Brian L. Hall, Esq., Barry & Hall, Reno, Nevada, for Intervenor; Otto Aho, Field Solicitor, for the Department of the Interior.

OPINION BY MR. STUEBING

This is an appeal by W. Dalton La Rue and Juanita S. La Rue, d/b/a Winnemucca Ranch from a decision of Administrative Law Judge L. K. Luoma, dated October 28, 1971, denying their request to relocate a stock fence which runs between the Winnemucca Ranch and Paiute Canyon allotments. The parties interested in this case are: The La Rues, appellants and owners of the Winnemucca Ranch; the Bureau of Land Management, with a brief in support of the Administrative Law Judge's ruling; the Matley Brothers, d/b/a M. S. Land and Livestock Company, intervenor.

A history of the area and ranches in question is necessary to an understanding of this case. Prior to 1949 the Matley's had control of a large area containing both ranches involved in this appeal. In the fall of 1949, the Matley's sold the Winnemucca and another ranch to a Mr. Gilbert. That year the Matley's allowed Gilbert to use a portion of the range here in issue. The following year both Gilbert and the Matleys applied for the use of the same range. During the time when an appeal from a decision dividing that range was pending, Gilbert sold to Hill. The appeal was settled by a decision allowing the Matleys' a drift on the Winnemucca Ranch. (Tr. 66). Because of the problems inherent in the drift arrangement (Tr. 67), in 1958 Hill (d/b/a Horseshoe Cattle Company) and intervenor entered into a Section 4 cooperative agreement to build a fence over public domain separating the Winnemucca Ranch and the Paiute Canyon Allotments. That agreement was approved by the District Manager on August 29, 1958. Under the agreement, the Bureau of Land Management was to furnish the fencing materials and the bulldozing and the cooperators were to furnish all the labor. The fence was flagged and built in the presence of the District Manager, the Matleys and Hill. (Tr. 69, 136). The fence, which was completed in the fall-spring of 1958-1959, was accepted by Hill and the Matleys as satisfactory and remains today along the same line as it was originally strung. (Ex. 10). The fence was known and referred to as the Winnemucca Valley Division Fence. (Ex. 6).

The fence line was thereafter regarded by the Horseshoe Cattle Company, intervenor and the Bureau of Land Management as the dividing line between the two allotments. (Tr. 55, 127-128, 214-218). The file contains documents verifying this. The boundary on the official unit allotment map (Ex. M-2) is substantially the same as the fence boundary. The Notice of Allocation of Grazing Privileges and Allotment Boundary (Ex. M-3) prepared in 1962 by the District

Manager establishing intervenor's qualifications for Class I grazing privileges on the Paiute Canyon private allotment indicates the same boundary as the official map. Another document, which is a narrative description of the area, also treats this line as the boundary. (Ex. M-6).

However, there are certain discrepancies in the description of the Winnemucca Ranch allotment as it appears in various documents. Prior to the agreement to construct the fence, the allotment boundary was a line established by metes and bounds, but without a fence, which lies in large part over one mile east of the present fence. The metes and bounds description was used to describe the allotment boundary in a license issued to the Horseshoe Cattle Company in 1958 (Ex. 2). Even after the construction of the fence, the same description was used in the Horseshoe Cattle Company's license each year until 1966 when the appellants acquired the property. In appellants' first approved application for grazing privileges, dated January 28, 1967, (Ex. J), the allotment boundaries are the same as those described by the metes and bounds boundary description in the 1958 license to the Horseshoe Cattle Company.

Thus, the fence line description in the cooperative agreement and the final project report is at variance with the description of the allotment in the licenses. In addition, a range line agreement, purportedly describing the Winnemucca Ranch allotment, executed by the appellants on May 16, 1967, and approved by the District Manager on June 23, 1967, (Ex. 9), makes reference to the Winnemucca Valley Fence but with obvious ambiguity goes on to describe by metes and bounds the boundary set out in the 1958 license.

These discrepancies have caused the controversy here. Appellants studied the Bureau of Land Management records and were assured by Bureau of Land Management personnel that the 1958 license described the Winnemucca allotment. Then on December 19, 1966, they took possession of the Ranch (Tr. 140). Thereafter, in May 1967, appellants signed a range line agreement as requested by the Bureau of Land Management. (Ex. 9). Upon receiving a copy of the cooperative agreement (Ex. 6), from the District Manager the following month, appellants learned that the division fence did not follow the line described in the 1958 license.

Appellants then made a formal request to have the fence moved (Ex. A), to conform to the boundary described in the 1958 license. In 1969 the District Manager responded by letter explaining that the allotment description based on the fence line satisfies all the Class I demands attached to the properties butting the boundary fence. (Ex. B).

At their hearing before the Judge, appellants contended that their predecessor in interest, Hill, entered into the 1958 Cooperative Agreement to construct the fence on representation that intervenor would transfer to him 1,400 AUMs. (Ex. 3). Intervenor's application to transfer these privileges was denied on the grounds that the Home Ranch, on which the application was based, was not entitled to Class I privileges. The rejection was signed one day after Mr. Hill's death. [Ex. L]. Appellants alleged that intervenor knew it had no right to the 1,400 AUMs which it offered as consideration for the fence line agreement and therefore there was no consideration for the cooperative agreement rendering it void. (Tr. 167). In ruling on that point the Judge said:

> Assuming that Mr. Hill's reliance on the intervenor's representation was misplaced does not alter the fact that the fence as completed in 1959 established the boundary line for the two allotments. If intervenor, through the alleged wrongdoing, had acquired more than his entitlement, then that would be a matter for settlement between itself and the BLM.

In addition the Judge held that appellants are now precluded from questioning the motivating factors behind the cooperative agreement. The decision reasoned that the allotments were divided and agreed upon ten years ago and 43 CFR 4115.2-1(e)(13)(i) sets a three year limitation on claims for reduction of licenses or permits of any applicant or intervenor with respect to qualifications of base property.

As to appellants' claim that the 1958 license sets out the boundary and therefore the fence should conform to that line, the decision below cites cases which hold that a grazing permittee has no right to any particular area of the federal range and since appellants are satisfied in their grazing use there is no basis for their complaint.

Appellants' final contention was that the present location of the fence does not comport with good range management practices because the fence has "pockets" where cattle gather and put pressure on the fence. The Judge's decision, based on testimony of intervenor and BLM personnel, held that appellants' point was not well taken; rather he found that the fence had been constructed along the more appropriate route. Also, if appellants' suggestions were to be followed, then appellants' grazing area would have to become a Class II grazing area and intervenor would be left short of forage to satisfy its Class I entitlement.

Appellants here assert basically the same points which they put forward below: First, that the original cooperative agreement

is void for lack of consideration and is based on fraud; second, that the position of the range fence violates sound range management practices by causing policing problems.

In support of their first argument appellants list several facts. Intervenor, in consideration for placing the fence in its present location rather than along the original 1958 adjudication boundary, agreed to transfer grazing rights covering 1,400 AUMs to Hill. In May 1957, 15 months before executing the agreement for construction of the fence, the Matleys had lost their appeal from an order denying them these identical privileges, an action which was final for this Department. Matley Brothers, et al., A-27486 (May 28, 1957), dismissing the appeal of the decision of the Judge dated May 28, 1954. Nevertheless, the Matleys made application to transfer these non-existent privileges to Hill on August 18, 1958. [Exhibit 4]. The BLM did not reject that application until one day after Hill's death, November 14, 1961. [Exhibits 4 and L]. On the basis of this evidence, appellants label the agreement as fraudulent and cite general legal principles holding contracts induced by fraud to be voidable and, then cite cases to the effect that range agreements are contracts and, as such, are governed by general contract law. Wayne M. and Mary B. Whitehill, I.G.D. 486 (1947); Mrs. Dulcie S. Williams, I.G.D. 280 (1942).

On the second point, that of proper range management, appellants presented evidence of poor placement of the fence causing misuse due to improper relation between water and land resources. Appellants assert poor placement of the fence for the reason that the fence is on a downhill slope allowing cattle to break it more easily than if it were placed on level ground. Also, appellants allege that the Matleys placed salt near the fence causing the cattle to break the fence to seek water on appellants' Horse Springs area. Alleging an improper relation between land and water resources, appellants point out that on the Matley's side of the fence there is no water, thus rendering it of little value for grazing. (Exhibit 7, Tr. 182). Therefore, appellants reason that it would be more in keeping with wise range management practices to return the area in dispute to them.

In answer to appellants, both the BLM and the M. S. Land and Livestock Company submitted briefs. Intervenor cites neither cases nor law, but only states its agreement with the Judge's decision and its opinion that if there were fraud involved appellants are "in the wrong ball park" and should go to a court of law.

The BLM, in its brief, restates the Judge's decision, elaborating on certain points and attacking several of appellants' arguments. Specifically, the BLM counters appellants' argument that the three-year statute of limitations set out in 43 CFR 4115.2-1(e)(13)(i)

does not apply here because an "adjudication did not occur until 1967" as the term is defined in 43 CFR 4110.0-5(t). The BLM points out that the policy of the Department is that not only formal adjudications are covered by the three-year statute of limitation, but any type of allotment settlement. W. Dalton LaRue, Sr., and Juanita S. LaRue, A-30391 (March 16, 1966).

We agree with the Bureau of Land Management that the three-year statute of limitation as set out in 43 CFR 4115.2-1(e)(13)(i) is applicable to adjudications other than those defined in 43 CFR 4110.0-5(t). That is the exact holding in Western States Cattle Company, Inc., et al., A-30572 (October 10, 1966) and is in keeping with the general policy that the three-year limit on adjudication of grazing allotments is defined as any "processing within the Department of applications, entries, claims, etc." Malvin Pedroli, et al., 75 I.D. 63, 68 (1968).

Appellants assert, however, that the entire agreement upon which the fence is based was induced by fraud and is therefore void for lack of consideration. Thus, no time limitation is of any effect.

Concerning appellants' first point, we agree that range agreements are "to all intents and purposes" contracts, and thus must comply with general legal principles applicable to contracts. Wayne M. and Mary B. Whitehill, supra; Mrs. Dulcie S. Williams, supra. Moreover, there is no question that intervenor must have known at the time of the 1958 cooperative agreement that the consideration for that agreement, i.e., 1,400 AUMs, were not intervenor's to transfer. Fifteen months before the fence cooperative agreement was signed the intervenor had lost any hope of being awarded the AUMs which it offered Hill. Matley Brothers, et al., supra. We also note that the former BLM Range Manager who signed both the cooperative agreement and the rejection of the transfer application should have known of the Department's decision holding that the intervenor had no right to the grazing privileges which it subsequently offered Hill.

Nevertheless, the question of fraud is not of controlling importance in this case. First, a federal grazing licensee has no right to any particular area of the federal range, 48 Stat. 1269 (1934) as amended, 43 U.S.C. §§ 315, 315(a)-315(r) (1970); George C. West, A-28862 (August 10, 1962). Also, as is pointed out by the government, a licensee's only reasonable basis for challenging his grazing allotment is to show the allotment to be incapable of satisfying the allottee's authorized grazing demand. Thomas Ormachea and Michael P. Casey, 73 I.D. 339 (1966); Harold Babcock, et al., A-30301 (June 16, 1965). Appellants do not deny that their present allotment fully satisfies their demand under their Class I forage privileges. Moreover, while we agree with appellants that the three-year limit is of secondary importance in that the BLM has the right

to exercise its discretionary power to modify existing allotments even after a licensee has lost his right to do so under 43 CFR 4115.2-1(e)(13)(i), we can find no basis in the evidence to do this. Malvin Pedroli, et al., supra; Benny Lucero, Appellant, Restie Sandoval and Matias Garcia, Intervenors, 8 IBLA 46 (1972). In addition to appellants' admission that they have a full allotment which fulfills their Class I privileges, a relocation of the fence to conform to the original line would cause appellants to gain 259 AUMs and intervenors to lose a corresponding number. This would require appellants to have the additional land licensed as Class II land which would necessitate common grazing between intervenor and appellants. [Tr. 51-52]. To allow common grazing would violate the original purpose of the fence which was to keep the drift between the ranches to a minimum. [Tr. 67]. The fence in question runs in part over appellants' private property. (Exhibit 10). The Judge suggested that the fence could be moved to the boundary of appellants' land and thus relieve any problems involved in its present position as concerns the appellants. The BLM had no objection to that suggestion. (Tr. 59).

The issue in this case is not how the fence came to be, but whether it should remain. The scope of examination to resolve this issue is limited to two questions. First, does the fence line serve as an appropriate boundary for the two allotments, affording each of the allottees full satisfaction of their base property qualifications? Second, does the location of the fence violate the tenets of proper range management to such a degree that relocation is required as a remedy? The preponderance of the evidence answers the first question in the affirmative, the second in the negative.

This department is seriously concerned by allegations of fraud associated with its apportionment of federal range land. Were it possible to conclude from the evidence in this case that a fraud had been perpetrated and, in consequence, the appellants had been deprived of a privilege to which they are entitled, this Board would act to set matters aright. But where it is established that the line is located so as to give both parties full satisfaction of their respective entitlements, as is the case here, the impetus for its location is not germane to the question of whether it should be moved. In short, we will not destroy an equitable and just apportionment of federal range in favor of some less desirable division simply because of the dubious origins of the present line. If the fence had not been built and the events associated with its construction had not occurred, the evidence indicates that it would still have been necessary to relocate the old metes and bounds division line to the approximate position of the present fence line, as the previous division line afforded appellants forage in excess of their Class 1 qualifications.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing, Member

We concur:

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Anne Poindexter Lewis, Member

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Joseph W. Goss, Member